In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 44.

No. 45.

CHARLES PEYTON WEST and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Respondent.

BRIEF OF PETITIONERS IN CERTIORARI.

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BRIEF OF PETITIONERS IN CERTIORARI.

A. STATEMENT OF CASE.

HISTORY OF THIS SUIT.

1. This suit is by remaindermen (petitioners here) of ninety-two (92) shares of stock against the corporation (respondent here) which issued it, for, (*a*) restoration of the stock, (*b*) to recover mesne dividends thereon, and (*c*) to recover damages for the difference in the value of the stock as of the time the remaindermen aver they were entitled to the stock and its lower value at the time of trial.

The suit was filed in the Federal District Court for the Northern District of Ohio, Eastern Division.

The District Court restored the stock, but held the remaindermen were not entitled to use and possession *in praesenti,* and accordingly denied mesne dividends, and damages, and trusteed the stock for the life of the life tenant. Both plaintiffs and defendant appealed from the District Court to the Circuit Court of Appeals for the Sixth Circuit (Nos. 8140, 8141).

The Circuit Court of Appeals held the remaindermen were barred from any recovery by Laches and by an Ohio Statute of Limitations, and accordingly dismissed the remaindermen's appeal, and reversed the decree. (R. 135, 141, 142.) This Court granted *certiorari* and the case is now for review.

THE STATE CASE.

2. But this was not the first litigation between these parties.

These petitioners first filed an action against this respondent in Cuyahoga County, Ohio, in the common pleas court, which is a court of original and general jurisdiction in that state. The state action was filed on June 2, 1934; and the record of the state case is substantially the same as the record in this case.

It may be stated at the outset, by way of explanation, that the petitioners in this Court were plaintiffs in the federal district court, and were appellants in the federal Circuit Court of Appeals; and respondent here was also appellant in the Circuit Court of Appeals. In the state court of common pleas these petitioners were plaintiffs, and respondent was defendant; and in the state court of appeals the respondent here was appellant, and these petitioners were appellees.

The material facts are as follows:

Charles P. West, plaintiffs' (petitioners here) father, a resident of Cleveland, Ohio, died March 21, 1926, leaving a will, which was duly admitted to probate by the probate court of Cuyahoga County, Ohio, at Cleveland, bequeathing a life use in his entire estate to his widow, Grace C. West, and a vested remainder to the plaintiffs, his sons, and naming the widow as executrix. Out of an abundance of caution the *testator expressly provided in his will* that the life tenant had authority to convert the assets in which

she had a life use, *only* "with the consent and advice of my two sons." (R. 65, Ex. 10.) The widow was duly appointed executrix and administered the estate. And on January 14, 1927, the executrix filed an application (R. 66, Ex. 11) in the probate court pursuant to Section 10509-181 of the General Code of Ohio for that court's approval of distribution in kind of the stocks held in the estate for distribution, alleging in the application, "all said stocks are bequeathed to her for and during her natural life."

That statute requires the distributees to consent to distribution of assets in kind, in lieu of having them converted into cash, and accordingly the plaintiffs in that case (these petitioners) signed the following consent:

> "We, the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind." (R. 67.)

The probate court, in the distribution proceeding, in its journal entry approving distribution in kind, found as follows:

> "The Court further finds that by virtue of the terms of the last will and testament of the said Charles P. West, deceased, all of said stocks are bequeathed to Grace C. West, his widow, for and during her natural lifetime, and that she is desirous of having the said stocks distributed unto herself in kind. The Court further finds that all of the next of kin of said decédent have duly consented in writing to such distribution." (R. 68.)

Two weeks after the distribution proceeding, to wit, on February 2, 1927, the executrix delivered to defendant company (respondent here) at its transfer office in New York City, eight stock certificates representing the ninety-two shares of defendant's stock in West's estate, endorsed by her as executrix. With the eight stock certificates, she also at the same time delivered to defendant true copies, duly certified by the probate court, of the following papers:

(1) Her letters testamentary;

(2) The probated will of Charles P. West;

(3) The application for authority to distribute in kind; and

(4) The order approving distribution in kind.

Upon the simultaneous receipt of all these documents, defendant's agents, though they had possession of these documents and were charged with full knowledge of their contents, issued a new certificate for the ninety-two shares in the name of Grace C. West, *without* evidencing on the certificate her limited interest, or plaintiffs' remainder (R. 69, Ex. 13), thus enabling the widow to dispose of the stock without the consent of the remaindermen.

Plaintiffs had no knowledge of the form of the new certificate of stock at the time of its issuance, and were not asked for, and of course did not give, consent to defendant to issue the certificate to the widow in the form above shown. (R. 22, 36.)

Meanwhile, Grace C. West changed her residence from Cleveland, Ohio, to Boston, Massachusetts. While residing at Boston, on October 31, 1929, at the beginning of the depression, she did sell the ninety-two shares to the firm of Paine, Webber & Co., her stockbroker, and a bona fide purchaser for value, and assigned and delivered the certificate (R. 69, Ex. 13) to the purchaser at its Boston office, with executed power of attorney to transfer it to the purchaser. The Boston office of the purchaser transmitted the certificate, together with the assignment of Grace C. West, and the power of attorney, to its main office in New York City, whence it was delivered to defendant's office at New York City, for transfer to the purchaser's name; and defendant thereupon on November 4, 1929, cancelled the certificate in Mrs. West's name, and issued to her purchaser a new certificate for the ninety-two shares.

Grace C. West is not the mother of petitioners, but is a sister of their mother who died years ago. That is, she

is plaintiffs' aunt and stepmother; she and plaintiffs' father were married after their mother's death. It was after the stepmother and widow had completed the administration of her husband's estate at Cleveland, that she moved to Boston; there she resided with a sister, Mrs. Helen Spitler. About June 10, 1930, Maurice John West, one of the plaintiffs, visited the aunts at Boston, and Mrs. Spitler then communicated to him in the course of conversation, her suspicion, "that Grace had suffered great losses in the stock market, and she thought some of our securities were gone * * *." (R. 30.) West then spoke to his stepmother about the securities and asked her to let him see the certificates, and she refused to do so. (R. 35.) Nothing was said to West then or at any other time to warrant the belief that she no longer possessed the certificates.

However, shortly after this, Mr. West returned to Cleveland which was his place of residence; he did not doubt the integrity of his stepmother, but thought it was the part of discretion to reassure himself of the error of Mrs. Spitler's suspicions, and went to the office of the Cleveland Electric Illuminating Company, some of whose stock was also in his father's estate, and inquired in what form the certificate was which it had issued to Grace C. West, and found it intact and in proper form:

> "Grace C. West, life tenant of the estate of Charles P. West, deceased."

Since the very same documents were furnished to each company at the time of transfer out of the estate in 1927, West necessarily inferred that the larger company had issued its certificates in proper form, since the smaller company had, and that the telephone stock must be intact, and felt embarrassed about further pursuing the inquiry on mere suspicion, into the conduct of his stepmother and aunt. And, after some additional inquiry, he dropped the subject. (R. 32.)

However, he heard further rumors early in 1934, and on April 4 of that year he wrote a letter of inquiry to defendant company, which thereupon informed him by letter that Grace C. West had ceased to be a stockholder on November 4, 1929. (R. 101, Defts'. Ex. D.)

The state suit was filed promptly after this correspondence.

Mrs. West has not at any time been a party to the litigation between these parties, and she is at this time in full life and between sixty-five and seventy years of age. (R. 121.)

It was stipulated by the parties that the value of defendant's stock was as follows at the next given dates:

October 31, 1929,	245.75;
November 4, 1929,	239.4;
April 4, 1930,	274.25; and
At the time of trial,	146⅓.

Dividends of $9 per share per annum have uniformly been paid at all times with which this litigation is concerned.

The common pleas court rendered judgment for the value of the stock as of the time of the defendant's cancellation of the West certificate on November 4, 1929, with interest.

The defendant thereupon appealed from the court of common pleas to the state court of appeals; the latter court on November 9, 1936, reversed the court of common pleas, and entered judgment for defendant; but the journal entry, and the mandate to the common pleas court, recite the following:

> "* * * the judgment of the said Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant * * *." (R. 11, 114.)

The opinion of the state court of appeals, as well as the aforesaid facts, is made part of the record in this Court

(R. 79), and is also reported as *West v. American Telephone and Telegraph Co.* (1936) 54 Ohio App. 369, 7 N. E. (2nd) 805, 7 Ohio Opinions 363.

The petition in the state common pleas court did not allege, and the evidence adduced there did not show, that plaintiffs had made demand on defendant for recognition of their rights in the shares in question.

And the sole and only ground for reversal given by the state court of appeals in its opinion, is that plaintiffs had no cause of action unless and until they had made demand on the corporation for recognition of their interests, and the demand had been refused. In the syllabus of the case which was written by the court, it is said:

> "* * * until such demand is made, no cause of action exists against the corporation." (R. 71.)

This view is also expressed on the last three pages of the opinion. (R. 78.)

In conformity to the Ohio practice the plaintiffs then filed a motion in the Supreme Court of Ohio asking that court to order the court of appeals to certify the record of the case. The Supreme Court overruled the motion on January 20, 1937.

THE RECORD IN THE INSTANT SUIT.

3. Then, on June 18, 1937, as required by the state court of appeals, plaintiffs made demand on defendant corporation for recognition and restoration of their rights. The demand was promptly refused, and the instant suit was thereupon filed on July 14, 1937, in the federal district at Cleveland, as aforesaid. The suit was filed in the federal court because of *diversity of citizenship.* As above stated, it is a suit in chancery for restoration of the destroyed shares, for dividends on the shares since November 4, 1929, and interest thereon; for damages represent-

ing the difference in the value of the stock with interest, and for such further relief as justice and equity require.

With this one exception that the federal petition necessarily alleges demand and refusal, and that the evidence in that court proves demand and refusal, the pleadings and the evidence in the federal court are the same as in the state court.

The federal district judge wrote a memorandum of opinion (R. 116-120) which was not published, and also made findings of fact and separate conclusions of law. (R. 120-124.)

As stated above, the district court held the plaintiffs were entitled to restoration of the stock; but that their remainder was not accelerated, and they should merely be put in the position they would be occupying if the life tenant had not sold the stock. The defendant was accordingly ordered to trustee ninety-two shares of its stock until the death of the life tenant.

From this decision both the plaintiffs and the defendant appealed to the Circuit Court of Appeals. That court held, (a) that demand was not necessary, (b) that the federal courts were not bound to follow the decision of the state court of appeals on demand, and (c) that the action was barred by laches and by the statute of limitations. (R. 136.)

The opinion is reported as *West v. American Telephone and Telegraph Co.* (1939) 108 Fed. (2d) 347 (C. C. A. 6th, 1939).

The opinion of the Circuit Court of Appeals is further discussed below under different heads.

B. ARGUMENT.

I. THE FIRST PROPOSITION THESE APPELLANTS DESIRE TO URGE, IS, THAT THE DECISION OF THE STATE COURT OF APPEALS ON THE ISSUE OF DEMAND IS RES JUDICATA.

Plaintiffs' petition was dismissed by the state court of appeals. Why? For one reason and one reason only—because the record did not show demand on defendant and its refusal. (R. 71.) That is the *ratio decidendi* of the case. The court declares in its opinion (R. 78) that defendant is liable, but no recovery is possible because the record does not show demand and refusal. The court would have allowed recovery but for the absence of this indispensable factor.

That is the one issue determined by that court—demand is prerequisite to suit. Judgment was rendered for defendant for this reason. It is in effect a ruling on general demurrer: It was held the petition does not state facts which show a cause of action because demand is not alleged; and the evidence does not establish a cause of action because the evidence does not prove a demand.

Therefore, however erroneous, or correct, this issue is finally decided as between these parties.

Blair v. Commissioner of Int. Rev. (1937) 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465;

De Sollar v. Hanscome (1895) 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956.

The issue actually adjudicated is a procedural point, but a decision on an issue of adjective law is as much *res judicata* as a decision on a point of substantive law.

2 *Freeman on Judgments* (5th Ed.) Sec. 745, p. 1567.

The judgment of the court necessarily and essentially decides only this issue, and that alone is therefore *res judicata.*

North Carolina R. Co. v. Story (1925) 268 U. S. 288, 45 S. Ct. 531, 69 L. Ed. 959, syllabus 2.

A decision by a state court is not only *res judicata* in state courts but is also *res judicata* in the federal courts.

Blair v. Commissioners of Int. Rev., supra;

Mitchell v. Bank (1901) 180 U. S. 471, 12 S. Ct. 418, 45 L. Ed. 627;

3 *Freeman on Judgments* (5th Ed.) Sec. 1465, p. 3009.

II. THE DECISION OF THE STATE COURT OF APPEALS ON DEMAND CREATES A RIGHT WHICH IS PROTECTED BY THE FIFTH AMENDMENT.

A right created or recognized by the decision of a state court is a vested right which cannot be impaired by subsequent decisions by the federal courts.

Muhlker v. N. Y. and Harlem R. Co. (1904) 197 U. S. 544, 25 S. Ct. 522, 49 L. Ed. 872.

The right to assert an action is a vested right which cannot be destroyed or abridged by any governmental agency.

16 *C. J. S.* Sec. 254, p. 675.

A statute of limitations can curtail the time within which to sue on existing causes of action, but no right of action can be entirely extinguished by over-limiting the period within which suit may be filed.

Smith v. Railway Co. (1930) 122 O. S. 45, 170 N. E. 637;

Wheeler v. Jackson (1890) 137 U. S. 245, 11 S. Ct. 76, 34 L. Ed. 659.

The adjudication of the state court of appeals recognized petitioners' right to make a demand, and upon refusal, the right to assert their cause of action would be mature. The right to make a demand accrued to them by the decision—a right *in praesenti,* which was therefore

vested. Being a vested right by the final determination of a court, no other court might later hold that right did not exist.

III. EVEN IF THE ISSUE OF DEMAND IN THIS CASE WERE NOT FINALLY DECIDED AND WERE NOT RES JUDICATA, EVEN IF THE DECISION OF THE STATE COURT DID NOT CONFER A VESTED RIGHT, NEVERTHELESS THE CIRCUIT COURT OF APPEALS COMMITTED ERROR IN HOLDING DEMAND WAS UNNECESSARY, BECAUSE THE LAW OF OHIO REQUIRES DEMAND, AND THE FEDERAL COURTS ARE BOUND BY THE LAW OF A STATE IN DIVERSITY OF CITIZENSHIP CASES.

1. It would be supererogation to discuss at length the case of *Erie R. Co. v. Tompkins* (1938) 304 U. S. 64, 58 S. Ct. 822, 82 L. Ed. 1188, 114 A. L. R. 1487.

It may be pointed out that it was a tort case.

The instant case is in equity, but the doctrine of the case is applied to equity cases.

Ruhlin v. N. Y. Life Ins. Co. (1938) 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290;

Rosenthal v. N. Y. Life Ins. Co. (1938) 304 U. S. 263, 58 S. Ct. 874, 82 L. Ed. 1330.

And it applies to questions of evidence.

Lyon v. Mutual Benefit Assn. (1938) 305 U. S. 484, at 489, 59 S. Ct. 297, 83 L. Ed. 303;

Cities Service Oil Co. v. Dunlap (1939) 308 U. S. 208, 84 L. Ed. 185, 60 S. Ct. 201 (Burden of proof);

Martin v. Cobb (1940) 110 Fed. (2d) 159, at 163.

It has long been the rule in the federal courts that the phrase, "laws of the several states," used in Section 34 of the Judiciary Act (28 U. S. C. A. Sec. 725, 1928) comprises the state statutes, and that the construction placed on them by the state courts, whether by the highest

or by lower courts, and even if the statutes deal with commercial law, is binding on the federal courts.

Erie R. Co. v. Hilt (1918) 247 U. S. 97, 62 L. Ed. 1003, 38 S. Ct. 435;

Burns Mortgage Co. v. Fried (1934) 292 U. S. 487, 54 S. Ct. 813, 78 L. Ed. 1380.

In the *Hilt* case Mr. Justice Holmes says:

> "In view of the importance of that tribunal in New Jersey [Intermediate Appellate Court], although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do."

Now, the *Tompkins* case establishes the doctrine that the common law of the several states is likewise binding on the federal courts in diversity of citizenship cases.

2. It remains to formulate the rule which is to govern in ascertaining what the state common law is.

In the *Tompkins* case it is asserted that it is not a matter of federal concern whether the state law is declared by the legislature or "by its highest court in a decision."

In *Ruhlin v. New York Life Insurance Co., supra,* this Court declares on pp. 208-9 of the opinion:

> "Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins,* does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done

in actions brought in the federal courts involving what were known as matters of 'local' law."

(1) Is it nevertheless possible that this Court contemplates only decisions of the highest state court as announcing the law of the state, as intimated in the *Tompkins* case? And if there are no such decisions, that the federal courts may apply the federal rule?

(2) Or does the doctrine include within its scope the decisions of only the intermediate courts which are courts of last resort because no appeal is afforded to the highest court by the law of the state, as in *In re Wiegand* (1939) 27 Fed. Supp. 725?

(3) Or does it embrace the decisions of the lower courts from which appeal does lie, in the cases where the highest court has not spoken? A case of this kind is *In re Gilliam* (1906) 152 Fed. 605 (C. C. A., 7th, certiorari denied, 206 U. S. 563).

(4) Or does it comprehend the general body of the common law of the state irrespective of the source of the law?

That the last given is the biggest and soundest principle, is respectfully submitted. That is, the federal courts are bound to decide a case as they think the state courts *would* decide it if the state courts were deciding the same case, and not as they think the state courts *should* decide it. 18 *Oregon L. R.* 307; 7 *Fordham L. R.* 438.

It would be arbitrary to have regard only for the adjudications of the highest state court. Needless to say, lower courts—even nisi prius—often display a learning and sound judgment unsurpassed by pronouncements of the highest courts.

3. However, even if it be the correct doctrine that the decisions of the highest court only are the state law, the judgment of the Circuit Court of Appeals in the instant case is nevertheless erroneous, because the Supreme

Court of Ohio, which is that state's highest court, has expressly held demand is prerequisite in actions by shareholders of corporations for recognition of their rights and for mesne dividends, as in the case at bar.

In *Steverding v. Cleveland Co-operative Stove Co.* (1929) 121 O. S. 250, 167 N. E. 883, the plaintiffs sought to require the defendant company to transfer to them certain shares of which they claimed to be owners by assignment or gift, and to recover declared but unpaid dividends on such stock, and to have stock dividend certificates issued to them. The defendant interposed the defense of the statute of limitations. As to this defense the court says on p. 252 of the opinion:

> "The dividends declared during the period covered in the petition were not barred by the statute of limitations, for the reason that the statute did not begin to run until a demand had been made therefor * * * or until the corporation had denied to the actual or qualified owner of such stock the right to receive such dividends."

Is the case at bar not parallel to the *Steverding* case —or as nearly so as one case ever can be to another?

The only factual difference is that in the instant case the complainants may be remaindermen; that they are no longer, is shown below. The Circuit Court of Appeals assumes they are remaindermen, and implies this is a decisive fact. (R. 139.) But the court fails to indicate the reason why it is a decisive fact.

Remaindermen may resort to courts to protect their rights no less than those in possession, as "real parties in interest." Section 11241 General Code of Ohio; *Pomeroy's Equity Jurisprudence* (4th Ed.) Sections 1536, 2153.

Moreover, as fully shown below, when the life tenant sold the shares in question, her life estate terminated and all rights in the shares accelerated to these petitioners; and from the moment of sale petitioners were as much the absolute owners of the shares as if the life tenant had

assigned the shares to them. Therefore, when the respondent, after the life tenant's sale, cancelled the certificate evidencing the West shares, and issued a new certificate to the life tenant's purchaser, the respondent not only destroyed the petitioners' remainder interest, but petitioners' absolute ownership, and use and possession of the shares.

In consequence, whether the petitioners are regarded as remaindermen, or as absolute owners, they are seeking to restore their rights in the shares, and the principle of the *Steverding* case decided by the highest court of Ohio should be applied.

It follows that the Circuit Court of Appeals erred in refusing to follow the law of Ohio as declared in that case.

A similar case decided by the Supreme Court of Ohio which might be cited, is *Cleveland and Mahoning R. Co. v. Robbins* (1880) 35 O. S. 483, where the owner of the stock sold it, and, knowing his purchaser had not procured a new certificate to be issued in his name, represented to the company he had lost his certificate and caused a duplicate certificate to be isued. Thereafter his purchaser demanded of the corporation that the stock be registered in his (the purchaser's) name. The company refused, because it had issued a duplicate to the former owner. Suit followed and the company set up the statute of limitations.

The court held on p. 502 of the opinion that the statute did not run against the plaintiff "*until the transfer was refused,* or he had notice that the stock had been transferred to other parties." (Italics ours.)

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4. However, if this Court should entertain the view that all rights in the stock did not accelerate to petitioners when the life tenant sold it on October 31, 1929, and that they are therefore still remaindermen, and if it should be the further view of this Court that petitioners are in error in invoking the rule laid down in the *Steverding*

case, then, the next question is, whether the decision of the state court of appeals is binding on the federal courts, or is not binding on them.

We have seen that that decision is *res judicata* on the necessity of demand, and also that it creates an unimpeachable vested right to assert the claim, and for these reasons is binding on all courts.

But there are further reasons why it should be followed: these reasons are, (a) that the decision declares the rule on demand in suits of this kind; and (b) the court is of such importance and dignity as to require the law declared by it to be followed by the federal courts.

(a) As to whether it is the only Ohio decision involving remaindermen, it is sufficient to say that none other has been found.

(b) The judicial system of Ohio is this:

The court of original and general jurisdiction is called the Court of Common Pleas; the first court of review is the Court of Appeals; and the next is the Supreme Court, which is the highest court.

The jurisdiction of the Court of Appeals is prescribed by the State Constitution, not by statute, and cannot be abridged or enlarged by statute.

Craig v. Welply (1922) 104 O. S. 312, 136 N. E. 143;

State v. Wallace (1923) 107 O. S. 557, 140 N. E. 305.

The Constitution of Ohio provides in part in Article IV, Sec. 6:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify, or reverse the judgments of the court of common pleas, * * * and other courts of record within the district * * * and judgments of courts of appeals shall be final in all cases, except cases involving

> questions arising under the constitution of the United States, or of this state, * * * and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. * * * and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

In the case at bar the Supreme Court refused to direct the court of appeals to certify its record. The Federal Circuit Court of Appeals (R. 140) asserts the refusal of the Supreme Court to issue an order to certify does not signify that the Supreme Court approves the law of the decision. Technically, that is correct; such ruling means that the highest court does not deem the case of sufficient "public or great general interest" under the Constitution, to warrant certiorari. The highest court has held that its failure to grant certiorari should not be regarded as a precedent in the same sense that its actual decisions are.

> *Village of Brewster v. Hill* (1934) 128 O. S. 343, 190 N. E. 766.

But the fact nevertheless remains that failure to order certification is in some degree an approval of the decision, and lends it partial sanction, and to this extent is the Supreme Court's pronouncement of the law. Lawyers are always concerned to learn whether a motion to certify was filed and overruled.

Again, only a small fraction of the cases litigated in the Ohio nisi prius courts and reviewed in the court of appeals, are attempted to be certified to the Supreme Court. And only a fraction of those knocking at the highest tribunal's doors are actually admitted. The highest court has absolute and arbitrary discretion in ruling on motions to certify—it may certify any case—and from its conclusions

there is no appeal. So that as a matter of fact, the judgments of the court of appeals are usually final. As above shown, the Constitution provides they "shall be final in all cases," with named exceptions. That tribunal is the court of last resort in the normal case.

For these reasons its decisions must be accorded a dignity and authority not unlike the decisions of the Supreme Court itself until the Supreme Court has announced its views.

What objections may be offered to this conclusion?

It is sometimes said that the federal courts are bound by decisions of lower state courts only when the lower courts have "state-wide jurisdiction." See case note, 53 *H. L. R.* p. 881. This principle was also asserted by the Circuit Court of Appeals in the instant case. (R. 140.)

When does a court have *state-wide* jurisdiction?

Is it when process issued by it can be served in any county of the state? Obviously, that is a mere matter of procedure?

Is it tenable to say that the Ohio court of appeals is one of only district jurisdiction, for the reason that it can review only the cases that are tried in the lower courts of its district, as prescribed by the constitutional provision above quoted?

But anyone may file a petition in such proceedings as quo warranto in any court of appeals in the state, and have process served anywhere in the state. Section 12313 of the General Code of Ohio.

If its decisions are sometimes in state-wide jurisdiction cases, and at other times in limited jurisdiction cases, depending on the local statutes, then are its pronouncements to have limited authority in some cases, and unlimited in others?

This query demonstrates the futility of a test so superficial as "state-wide jurisdiction."

The Circuit Court of Appeals also asserts the decisions of one state court of appeals are not binding on other state courts of appeals. (R. 140.) But the fact is that no court is bound by any decision in the State of Ohio, whether rendered by a low court or a high court. A nisi court may with entire impunity disregard and overrule the judgments of even the Supreme Court in other cases. And occasionally on further examination, the Supreme Court on review concurs with the nisi prius court. No doctrine infringes on any court except *stare decisis,* and this doctrine does not *bind* a court to follow even its own prior decisions. There is no binding force in this doctrine except that the public interest requires certainty and uniformity.

Kearny v. Buttles (1853) 1 O. S. 362, at 366;
State v. Yates (1902) 66 O. S. 546, 64 N. E. 570.

The decisions of a court of appeals are essentially not in the least binding on itself and the courts under it; not more binding than the decisions of other courts of appeals. This is the simple fact.

The argument that its decisions do not bind other courts of appeals is therefore superficial and insubstantial.

But the decisions of the Ohio courts of appeals are of importance in all the courts of the state, and declare the law of Ohio, in the absence of adverse pronouncements by the Supreme Court, and not merely the law of their districts.

It is above urged that the only sound rule in diversity of citizenship cases is, that the federal courts *should* decide as they think the state courts *would* decide in the same case.

This is a wholesome rule; all the reasoning of all the tribunals may thus be scrutinized for the particular rule of law. That is done in the state courts; and consistency requires that it be done in the federal courts, as clearly

suggested in the *Ruhlin* case; it is only thus that the state law may be fully absorbed and formulated.

For the law of the state is often well settled by a series of subordinate court decisions, which leave no doubt of the particular rule, but which do diverge from the federal decisions. In such cases, as pointed out in the *Tompkins* case, two citizens of the same state have different brands of justice.

If this doctrine is invoked, then no doubt can exist, for this particular reason alone, that demand was required in the case at bar, and the Circuit Court of Appeals erred in holding it was not required.

IV. SINCE DEMAND WAS REQUIRED, THE ACTION CANNOT BE BARRED BY ANY STATUTE OF LIMITATIONS; FOR STATUTES OF LIMITATIONS DO NOT RUN UNTIL DEMAND IS REFUSED. IF DEMAND WERE NOT NECESSARY, THE INSTANT ACTION WOULD NEVERTHELESS NOT BE BARRED BY ANY STATUTE.

1. Before discussing the statutes of limitations, a brief summary may be convenient to refresh the mind as to the germane facts.

Though it had in its possession a certified copy of the deceased Mr. West's will bequeathing to Grace C. West a life estate, and to the petitioners a vested remainder, and providing that the life tenant may not sell without the consent of the remaindermen, the respondent, in February, 1927, in breach of duty, issued its stock certificate for ninety-two shares to Grace C. West in her own name, enabling her to sell without such consent. Being enabled to sell, she did sell on October 31, 1929, to a bona fide purchaser for value; and endorsed the certificate over and executed a power of attorney authorizing transfer to her purchaser. On November 4, 1929, respondent, again in breach of duty, cancelled the West certificate and discarded it, and issued a new certificate to Mrs. West's purchaser, who had no knowledge of her life estate or her lack of

authority to sell the stock. The remaindermen had full confidence in the life tenant who was their stepmother and their true mother's sister and did not know the certificate issued to her failed to show her limited interest, or their remainder interest. Nor did they have the barest intimation that she had disposed of the stock in 1929 until Mrs. Spitler conveyed to Maurice J. West her unsupported suspicions that some of their securities might be gone.

It occurred to petitioners that if the certificates were properly issued, the life tenant would be unable to dispose of the stock without their consent. A block of the estate securities consisted of Cleveland Electric Illuminating Company stock; and, to reassure himself that his aunt, Mrs. Spitler, was in error in suspecting that some of their securities might be gone, Maurice J. West promptly repaired to the office of the Cleveland company to ascertain the form of the certificate it had issued to Mrs. West and whether that stock was intact. He found the stock intact and in proper form. He made some further inquiry, and concluded all the stocks, including respondent's, must have been properly issued and therefore must be intact, and dismissed the subject from his mind.

All this time respondent was possessed of a certified copy of the will, and was charged with full knowledge of these facts, (a) that it had wrongfully issued its certificate to Mrs. West in 1927, in such form as to enable her to dispose of the stock, (b) that she had actually disposed of it, and (c) that it had cancelled the West certificate in November, 1929 and issued a new certificate to a third person. And notwithstanding this knowledge and the fiduciary relation existing between it and all its shareholders, respondent failed and neglected to communicate such knowledge to petitioners, and now confronts them with the statute of limitations, and with their supposed laches.

Then, in 1934, the petitioners heard further rumors of the loss of their securities and Maurice J. West wrote

respondent company inquiring what the fact was, and learned Mrs. West had ceased to be a stockholder on November 4, 1929.

Shortly after that, on June 2, 1934, suit was filed against respondent company in the common pleas court.

The state court of appeals reversed the common pleas court on November 9, 1936.

The Supreme Court of Ohio overruled the motion to certify on January 20, 1937.

Demand was made on June 18, 1937.

And after refusal of the demand the instant suit was filed on July 14, 1937.

2. Now, it is not only the law of Ohio but the general rule that no statute of limitations begins to run where demand is necessary, until it is made and refused.

Steverding v. Co-operative Stove Co. (1929), 121 O. S. 250, 167 N. E. 883;
Railway Co. v. Robbins (1880), 35 O. S. 483;
Note, 47 *A. L. R.* 178;
26 *R. C. L.* Sec. 57, p. 1143.

3. But if no demand were necessary, the action would still not be barred by any statute.

The Circuit Court of Appeals argues (R. 141) that the cause of action arose in February, 1927, when the certificate was in the first instance wrongfully issued to Mrs. West in her individual name. This is doubtful, to say the least; for no loss occurred until November 4, 1929, when respondent cancelled and discarded the West certificate. Petitioners would probably have had a cause of action to reform that certificate from and after it was issued in 1927; but no action to restore the lost shares could possibly have accrued until November 4, 1929, for no loss occurred until then.

Marbury v. Ehlen (1890), 72 Md. 206;
Baker v. Atlantic Coast Line Railroad Co. (1917), 173 N. C. 365.

In *Glidden v. Mechanics' National Bank* (1895), 53 O. S. 588, at 602, it was held that the statute does not run against a pledgor until his pledgee, who had converted the property, had put it beyond his power to perform the pledge. It was not until then that the pledgor actually sustained a loss, and no cause of action could accrue before.

4. Again, the Circuit Court of Appeals takes it for granted that this is a tort action in trover, and that Section 11224 of the General Code of Ohio has application, and under that statute the action was barred in four years, that is, in February, 1931. The pertinent parts of that section read as follows:

> "An action for either of the following causes shall be brought within four years after the cause thereof accrued: * * *
>
> "2. For the recovery of personal property, or for taking or detaining it; * * *
>
> "4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.
>
> "If the action be * * * for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered * * *."

This is the Ohio statute that governs trover cases.

40 *O. Jur.* Sec. 79, p. 60.

The life tenant may indeed be liable for the tort called conversion, redressible in the action known as trover, and an action against her would be governed by this section.

But the instant action is not against the life tenant—it is against the corporation that cancelled the certificate evidencing petitioners' property.

The relation between a corporation and its shareholders is essentially *contractual.*

Allen v. Scott (1922), 104 O. S. 436, at 439, 135 N. E. 683;

Keith v. State (1925), 113 O. S. 491, 149 N. E. 866.

And by the best and latest authorities, including New York, an action by a stockholder against a corporation for wrongful cancellation of his stock certificates, or other denial of his rights by wrongful transfer, is an *ex contractu* action, not *ex delicto*.

Fletcher on Corporations (Perm. Ed.), Section 5538, at p. 451;

Travis v. Knox Terpezone Co. (1915), 215 N. Y. 259, 109 N. E. 250 ("It is the enforcement of a contract between the corporation and its member.");

Steindler v. Va. Pub. Ser. Co. (1934), 163 Va. 462, 175 S. E. 188, 95 A. L. R. 220.

Since it is an *ex contractu* action, statutes other than the above apply. Section 11221 is the statute limiting actions on written contracts and reads as follows:

"An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued."

Sec. 11222 governs actions on oral contracts, and reads thus in part:

"An action upon a contract not in writing, express or implied, * * *, shall be brought within six years after the cause thereof accrued."

The Supreme Court of Ohio applied this six year statute in the *Steverding* case, *supra*; see p. 251 of opinion. The action there, as will be recalled, was to require issuance of certificates of stock to plaintiffs, and for mesne dividends, and to transfer to them certificates of stock dividends.

It would appear to be quite conclusive that this is a contract action and either the six year statute, or the fifteen year statute, governs. Since no statute could run until the loss of the stock in November, 1929, the action could not be barred even under the six year statute until November, 1935. But the Common Pleas Court case was filed on June 2, 1934, the previous year.

Therefore, assuming no demand were necessary and the statute nevertheless ran, though the demand was actually made, the original action was filed in the Common Pleas Court within ample time.

Suit was filed in the federal court on July 14, 1937, only some months after the "reversal" in the state courts on November 9, 1936.

Section 11233 General Code of Ohio provides in material part:

> "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff * * * may commence a new action within one year after such date. * * *"

The instant federal suit, having been filed within one year after "the date of reversal," in the state courts, was filed in time.

5. And there is a further reason why no statute of limitations bars the suit, even if no demand were necessary. It is that no statute runs until plaintiffs have notice of the wrongful transfer. The plaintiffs were ignorant of defendant's wrongs, which defendant necessarily was fully aware of; and defendant occupied a fiduciary relation to plaintiffs as the protector of their property; but it not only failed to protect it, but kept them in the dark about its loss. The courts all hold the corporation is trustee of the shares for the shareholder. It is a relation of trust and confidence. It may properly be regarded as even an express existing and subsisting trust.

> *Larwill v. Burke* (1900), 19 C. C. 449, 513, 10 C. D. 579, 605 (Aff. without opinion, 66 O. S. 683).

Whether or not it is an express trust, the relation is such as to set in motion the protective devices inuring to

plaintiffs in fraud cases. The statutes usually applied in such cases read that no bar can be interposed until the plaintiffs discover the wrong.

For example, Section 11224 of the General Code of Ohio provides that the statute does not run if the action "be for fraud, until the fraud is discovered."

In *Railway Co. v. Robbins* (1880), 35 O. S. 483, at 502, the Supreme Court of Ohio *expressly holds that no statute runs against a shareholder until he discovers the company's wrongful transfer.* This is for the reason that the company has sole control over the stock register.

The Ohio Supreme Court has frequently invoked the last named statute where the plaintiffs had no knowledge of wrongs by persons in control of their property. See *Morris v. Mull* (1924), 110 O. S. 624, 144 N. E. 436; *Seeds v. Seeds* (1927), 116 O. S. 144, 156 N. E. 193; and *Morton v. Petitt* (1931), 124 O. S. 241, 177 N. E. 591; *Larwill v. Burke, supra.* The last cited case is a corporate stock case.

However, we do not wish to dwell on the statutes of limitation in disproportion to their significance in this case. For here no statute can possibly be held to bar the action, upon any tenable consideration.

V. THE APPELLANTS ARE NOT BARRED BY LACHES, BECAUSE LACHES IS AN EQUITABLE DEFENSE, AND ALL THE EQUITIES IN THE INSTANT CASE ARE WITH PETITIONERS.

The Circuit Court of Appeals holds no demand was necessary, and therefore the action is barred by the statute of limitations; but the court holds further that if demand were required, there was too much delay between the wrong and the demand, and petitioners are therefore barred by laches. (R. 142.)

The court argues that especially does laches exist here for these reasons: the suit is in equity; no fraud or concealment is charged; respondent may well have lost its

remedy against the life tenant; and that there may be collusion between petitioners and the life tenant.

Would appellee company not have discovered and averred and proved collusion, and loss of remedy against the life tenant occasioned by delay, and made these facts part of the record in this case, which is wholly silent on these facts? This simple query reveals that court's fantasies.

In reference to fraud or concealment the record shows nothing except the passive concealment of respondent in failing to notify petitioners when the West certificate was issued in 1927 in defiance of the express terms of Mr. West's will, and in failing to give them notice of the presentation of that certificate for cancellation in 1929, or of its actual cancellation.

Whether the concealment was active or passive, the respondent was in fact at all times charged with full knowledge of its wrongs, and petitioners did not possess such knowledge. How the equitable defense of laches is valid under such circumstances, is difficult of comprehension.

What is the defense of *laches* in Ohio?

The Circuit Court of Appeals cites *Keithler v. Foster* (1871), 22 O. S. 27, and comments:

> "The demand under such circumstances is not to be delayed beyond the period of the statute, which in this case is four years."

The manifest fact is that *Keithler v. Foster* holds, as do all the cases, that demand may be made at any *reasonable time.* It need not be made within the period of the statute. The court says on page 31 of the opinion that what is a reasonable time depends on the circumstances of each case, and quotes from *Angel on Limitations,* as follows:

> "If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action."

That is, it may be assumed that the period of the statute is a reasonable time within which to make the demand. But if good cause for a later demand be shown, no laches supervenes.

In *Russell v. Fourth National Bank* (1921), 102 O. S. 248, at 267, 131 N. E. 726, the following is approved from 10 *Ruling Case Law*, 396, in reference to the rule barring actions by laches:

> "Its object is in general to exact of the complainant fair dealing with his adversary, and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy."

It will be noted that not one aspect of laches given in that decision is present in the instant case.

Lapse of time is not enough. There must be a great or unreasonable lapse of time. This is the first and foremost element of laches.

And plaintiff must have had knowledge of his cause of action.

> 4 *Pomeroy's Eq. Jur.* Sec. 1447.

Not only are an unreasonable lapse of time, and knowledge of the cause of action, essential elements, but also prejudice to defendant on account of the delay.

16 *O. Jur.* p. 111, puts the Ohio rule in this language:

> "The delay, knowledge, and acquiescence of the plaintiff, unless under circumstances giving rise to a presumption of abandonment, or the like, are not alone sufficient to constitute laches, without prejudice to another."

That the facts in this record do not bring the case within the rules governing laches, is so obvious, as to make further discussion superfluous:

The delay here is a few years;

The petitioners were not informed of the cause of action until 1934. The suspicion told to Maurice J. West in 1930 was soon dispelled by his own investigation. Almost immediately upon learning the stocks were gone, they filed suit;

And not one scintilla of actual, as distinguished from imaginary, evidence can be found in the record showing or tending to show the least prejudice suffered by respondent by reason of the delay in making demand.

VI. THE UNAUTHORIZED SALE OF THE STOCK BY THE LIFE TENANT TERMINATED HER LIFE ESTATE, AND ACCELERATED ALL RIGHTS IN, AND ACCRUING FROM, THE STOCK TO THE REMAINDERMEN AS OF THE TIME OF THE SALE. AND THE SALE, HAVING BEEN MADE POSSIBLE BY THE WRONGFUL ACT OF RESPONDENT, IS TO BE LAID AT RESPONDENT'S DOOR, AS OF THE TIME IT RECOGNIZED THE SALE, CANCELLED THE WEST CERTIFICATE AND ISSUED A NEW CERTIFICATE TO A THIRD PERSON.

1. The legal consequences of a tortious act are governed by the law of the place of the wrong.

Restatement of Conflict of Laws, Sections 378, 384;
5 *R. C. L.* p. 917;
15 *C. J. S.* p. 896.

2. The life tenant's conversion of the stock occurred in Massachusetts, and the law of that state applies as to the legal results flowing from the conversion.

In Massachusetts, as well as elsewhere, conversion of personalty by a limited holder terminates the limited estate of the converter and accelerates the property to the immediate use and possession of the reversioner, remainderman, or bailor, as the case may be.

The same consequences follow "tortious conveyance" of real estate by a life tenant, in that state, in the absence of statute. See discussion under 4 below:

In *Phillips v. Allen* (1863), 89 Mass. 115, a life tenant of land cut trees on the land, and then sold them. The remainderman sought to recover the value of the trees, and the Court says on page 116:

> "It is true that the plaintiff had no right to the standing trees, or any profits arising therefrom, during the continuance of the life estate, and it is only by the illegal acts of the tenant for life that any such claim exists. But by such acts the right to the timber and wood thus cut vested at once in the plaintiff, and to the amount in value of this property the ordinary interest should be added in assessing the damages at the present time."

A complete statement of the Massachusetts law which governs the instant case is found in *Leonard v. Stickney* (1881), 131 Mass. 541. At page 545 of the opinion, the Court cites *Phillips v. Allen, supra,* and then says:

> "By the illegal act of the tenant for life, the remainderman is invested with the right to property to which otherwise he would have no claim except at the termination of the tenancy. * * * Where one violates the terms of a bailment of personal property, by removing it from the place where alone he was entitled to use it, or by selling it, the rule is similar. His wrongful act terminates his possession, and the bailor has a right to it immediately. * * * The defendant was the tenant of the plaintiff. Articles which were part of the realty were let to her for use on the premises during the term. If by her wrongful act she separated them, they became at once the personal property of the landlord, and all right of the wrongdoer ceased therein."

This appears to be the universal rule, and not merely the law of Massachusetts.

In *Coffey v. Wilkerson* (1858) 58 Ky. 101, a life tenant of slaves sold them and they were eventually acquired by an innocent purchaser for value. The court held in an action by the remaindermen against the life tenant:

"Where, as in this case, the person holding the life estate converts not merely the life estate, but the absolute and entire estate in the property to his own use, and that with the effect of defeating the enjoyment of the estate in remainder, he becomes immediately responsible for the act to the persons entitled in remainder, who have a right to recover against him the full value of their estate."

This case is approved and followed in *Yeager v. Bank*, 127 Ky. 751, which was a corporation stock case.

In the Ohio case of *Allen v. Insurance Co.* (1894), 10 Oh. Dec. Repr. 204 (affirmed without opinion, 52 O. S. 622) the facts are: The testator bequeathed all his property to his wife for life; "the remainder of the estate unexpended by her" was bequeathed to persons mentioned; the wife was named as executrix, and after her death other persons were named to act as executors to make distribution of the property. Testator owned 225 shares of stock in defendant corporation.

The Company, erroneously assuming that under the will the widow was absolute owner, transferred the stock to her absolutely. Then in 1885 she sold to a purchaser for value without notice. She died in 1886, a year after the sale. After her death the executors filed suit against the corporation to recover the stock and mesne dividends. The questions were, What is the remedy? and, May recovery of dividends be made which accrued between the time of the widow's sale to the innocent purchaser and her death? The court held that the widow had only a life estate, that the company assumed otherwise at its peril, and on pages 211 and 212, concludes as follows:

"As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of stock, or to pay the value of the same in money, and for the amount of the dividends declared since the wrongful transfer."

If the court means what it says, the corporation was responsible to the remaindermen for the dividends from and after the wrongful transfer; that is to say, by her sale the widow lost the dividends which she would have been entitled to as life tenant up to the time of her death, if she had not sold; that is, from the time of her conversion to her death, the remaindermen were entitled to the income although she was still alive during that interval.

3. The doctrine of termination of a limited estate resulting from the wrongful acts of the custodian of property, is of general application. All the analogies of the law point to this doctrine.

As held in *Leonard v. Stickney, supra,* and in all the cases, conversion by a bailee terminates the bailment and vests the property in the bailor.

3 *R. C. L.* p. 149.

Where a converter by his efforts enhances the value of the property taken, he not only must give up the property, but loses the enhanced value as well.

Tracy v. Coal Co. (1926) 115 O. S. 298, 152 N. E. 641.

A like principle underlies the common law doctrine of *confusion of goods.* One who intermingles another's property with his own so as to destroy the identity of the other's property, not only must relinquish the other's property, but his own with it.

5 *R. C. L.* Sec. 4, pp. 1051, 1052;
Note, 10 *A. L. R.* 765.

4. Conversion by a life tenant not only annihilates the life estate, but also accelerates the remainder to immediate possession and use and to absolute ownership.

In 16 *O. Jur.* 493, the Ohio law is thus summarized:

"A vested remainder may be accelerated by the premature determination of the preceding estate. The general rule is that in the absence of a controlling

equity or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder, it takes effect in possession whenever the prior gift ceases or fails, in *whatever manner.*'' (Italics ours.)

In *Holt v. Lamb* (1867) 17 O. S. 374, at 387, it is said—

''Undoubtedly the law of remainder is, that it begins as soon as the life estate is at an end, *even though it be in the lifetime of the tenant for life.*'' (Italics ours.)

In *Fowler v. Samuel* (1912) 257 Ill. 30, the Court uses this language on p. 34 of the Opinion:

''* * * where the taking effect in possession of the ulterior devise or remainder is postponed only in order that a life estate may be given to a life tenant, upon the failure or destruction of the life estate the rights of the second taker are accelerated although the prior donee be still alive.''

Where the children of the testator are the remaindermen, and the widow is the life tenant, manifestly the remaindermen's possession is postponed only to make way for the life use. Then when the life tenant in some manner terminates her use, the absolute property immediately falls to the remaindermen.

A remainder is in like manner accelerated upon the widow's election to take according to law and not to take the provisions made by the will of her deceased husband.

Davidson v. Miner's and Mechanics S. & T. Co. (1935) 129 O. S. 418, 195 N. E. 845 (Syl. 1):

''* * * The widow's election is equivalent to her death so far as the will is concerned. * * *''

See also

Holdren v. Holdren (1908) 78 O. S. 276, 85 N. E. 537, 18 L. R. A. (N. S.) 272;

Millikin v. Welliver (1882) 37 O. S. 460;

28 *R. C. L.* 334; 21 *C. J.* 1142.

In the case at bar, the sale of the whole property, of necessity extinguished and terminated the life estate. It was merged into the remainder, and was extinguished as if the life tenant had died.

For the logic of the situation is this:

When the life tenant assigned the shares to an innocent purchaser for value, she assigned not only her life estate but also the remainder to the same holder; and wherever the lesser and the greater estate in the same property meet in the same person, the lesser estate is extinguished by merger.

A good statement of the doctrine of merger is given in a note in 93 *Am. St. Rep.* p. 153, where it is said:

> "Merger is the annihilation of an estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged, that is, sunk or drowned, in the greater."

The life estate in the stock having been annihilated and terminated, the vested remainder in it, inevitably accelerated in immediate possession and use, and the stock became the absolute property of petitioners.

And when respondent cancelled the certificate and registered the transfer to Paine, Webber & Co., on November 4, 1929, all the rights in and accruing from the shares of every kind, had already vested in petitioners.

5. As stated above, the "tortious conveyance" by a life tenant of real estate, as well as of personal property, effects a termination of the life estate. That was the rule at common law both in England and Massachusetts.

Tiffany on Real Property (2d Ed.), Sec. 427, thus states the rule of "tortious conveyance":

> "Since a feoffment operated on the possession alone, any person having possession of land, even though, as in the case of a tenant for years, not legally seised, could, by feoffment to a stranger, create in the latter

an estate of any quantum; and so one having seisin as of an estate for life could create in another a greater estate. Since the effect of such a transfer of seisin was to operate wrongfully upon the interest of the owner of the reversion or remainder, it was termed a 'tortious conveyance.'"

5 *Dane's Abridgement of American Law,* p. 13, cites *Commonwealth v. Welcome,* an early Massachusetts case, not affected by later statutes, but governed by the common law of that state, where a life tenant of land, without power to sell, conveyed, or purported to convey, a fee simple. It was held—

"* * * by his conveying an estate in fee, he destroys and annihilates his own life estate; it ceases to exist, is thus put out of the way and is ended; and then the entry of him next in remainder or reversion, accrues, as it always does, when the life estate next preceding is terminated."

Thus, at the common law of Massachusetts, both realty and personalty are governed by the same rule in regard to the effect of a wrongful conveyance by a life tenant; namely, such conveyance entails termination of the life estate, and acceleration of the remainder.

The conclusion must be that all the property rights in the shares in question were in the remaindermen when the certificate was presented to the corporation by Paine, Webber & Co., on November 4, 1929, and it thereupon cancelled that certificate and thus destroyed petitioners' property.

It might be noted, parenthetically, that because of the common law rule on the effect of tortious conveyance by a life tenant of real estate, the legislature of that state many years ago enacted a statute which is Section 9, Chapter 184, of the statutes of that state; such Chapter 184 is entitled, "General Provisions Relative to Real Property" and is expressly confined in operation to that species of property. Section 9 reads thus—

"*Deed of Tenant for life or years.*—A conveyance by a tenant for life or years which purports to grant a

greater estate than he possesses or can lawfully convey shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such grantor can lawfully convey."

This statute cannot by any process of reasoning be made to apply to personal property. And it will be observed that *Leonard v. Stickney, supra,* was decided many years after the enactment of this section and the statute is not mentioned in the opinion. That case involved personal property, and the statute relates to real property.

The reason for the statute is that under modern Recording Acts, the remainderman is protected by the public record. A purported conveyance by the life tenant of the whole of real property, does not convey the remainder—only the life estate; because the purchaser is charged with notice of the public record evidencing the remainder in others.

VII. A CORPORATION MUST RESPOND TO SHAREHOLDERS FOR LOSSES RESULTING FROM UNAUTHORIZED AND WRONGFUL TRANSFERS.

1. No one questions this principle. Many cases put the liability on the theory of *negligence.*

St. Romes v. Levee Steam Cotton Press Co. (1887) 127 U. S. 614.

Others hold it is *conversion.*

6 *Thompson on Corporations* (3rd Ed.), Sec. 4435.

In the leading case of *Loring v. Salisbury Mills* (1878) 125 Mass. 138, at p. 150, it is said, without declaring any theory:

"All the authorities affirm such liability where the corporation has notice that the present holder is a trustee, and of the name of his *cestui que* trust, and issues the new certificate without any inquiry whether his trust authorizes him to make a transfer."

2. Of course, the corporation need not respond where it does not have notice of the rights of the persons who are prejudiced by the wrongful transfer.

7 R. C. L. pp. 272, 273, states the rule as follows—

> "Where the corporation has notice that one of its stockholders is a trustee, or such notice is imputable to it, it is guilty of actionable negligence if it permits him to transfer the stock without any inquiry as to whether the *cestui que* trust has authorized the transfer. * * * It is generally held that the owner of the stock may sue to recover damages on the theory that by permitting his stock to be transferred without his authority, the corporation commits a technical conversion. The corporation must see that no unauthorized transfers of its stock are made, and is liable to any one injured by a breach or neglect of its duty."

The *Restatement of the Law of Trusts*, Sec. 325, Comment C says:

> "If shares of stock are registered in the name of the trustee followed by words indicating that he is trustee the corporation is bound to inquire whether the trustee is committing a breach of trust in making the transfer, and is liable for participation in the breach of trust if such inquiry would indicate that the trustee was committing a breach of trust."

Now, a life tenant occupies the position of *trustee* in respect to the remaindermen.

Johnson v. Johnson (1894) 51 O. S. 446, at 460, 461.

But, of course, it makes no difference who the custodian is. When the corporation has knowledge that one is "executor," "agent," "legatee," "pledgee," "life tenant," it must issue the certificate correctly, and protect the real or future interest holder in respect to transfers, the same as in the case of trustees.

2 *Cook on Corporations* (8th Ed.), Sec. 330, p. 1173;
Note, 56 *A. L. R.* 1199.

Where the corporation is put on inquiry as to the rights of third persons, it is chargeable with notice of all facts which an inquiry would have revealed. See Chief Justice Taney's opinion in *Lowry v. Bank* (1848) Taney's Opinions, 310 Fed. Cases No. 8,581, where are laid down the rules for such cases. The *Lowry* case is the leading American case, and is approved and followed in *Railroad Co. v. Robbins* (1880) 35 O. S. 483, 500.

In the 4th syllabus of the *Lowry* case, Chief Justice Taney says—

> "* * * the corporation whose stock is transferred is made the custodian of the shares, and is clothed with power to protect the rights of everyone from unauthorized transfers. It is a trust placed in its hands for the protection of individual interests, and like every other trustee, it is bound to exercise the trust with proper diligence and care; and it is responsible for any injury sustained by its negligence or misconduct."

A corporation is liable where the assignment of the stock, or power of attorney to transfer it, is forged; it is bound to know the genuine signatures of its shareholders. *Western Union Telegraph Co. v. Davenport* (1878) 97 U. S. 369, 24 L. Ed. 1047; *Moores v. Bank* (1884) 111 U. S. 156, 28 L. Ed. 385. And see Note, 56 *A. L. R.* 1199.

3. Respondent is therefore liable.

It is liable, *first,* because in 1927 it issued the certificate in the individual name of Grace C. West, directly enabling her to dispose of the property to petitioners' loss. It thus becomes a participant in the life tenant's act of conversion. *Lowry v. Bank, supra.*

And, *secondly,* when Paine, Webber and Co. in 1929 presented for transfer the certificate in her name endorsed by Grace C. West, respondent was bound to know these facts: that Grace C. West had only a life use in the stock, that she could not sell it, that by her sale she had converted

the stock, and that by acceleration it already belonged to petitioners. Having this knowledge, it was respondent's absolute and unqualified duty to protect petitioners' property. Instead, respondent cancelled petitioners' certificate, the evidence of their ownership, and used petitioners' property to discharge its liability to the innocent purchaser, who became an innocent purchaser because respondent by issuing the certificate in 1927 in the name of Grace C. West, falsely represented to all prospective purchasers, that she was the absolute owner.

For, when respondent wrongfully issued the certificate in 1927, in the name of Grace C. West, it must be held to contemplate and know, "that persons relying upon it will purchase the certificate in the market and meet with loss, should the person named in it not be the lawful owner of it. It must therefore be held to care in regard to this, and answer for any loss, the result of its negligence * * *." *Railway Co. v. Citizens National Bank* (1897) 56 O. S. 351, at pp. 384, 385. Such issuance therefore was a proximate cause of the loss.

Needless to say, respondent had no right to cancel petitioners' certificate, and to deprive them of their property, therewith to pay its obligation to an innocent purchaser who became purchaser solely through its own antecedent wrongful act.

A well considered case is *Baker v. Atlantic Coast Line Railroad Company* (1917) 173 N. C. 365, where the testator bequeathed stock of defendant to his son, John Baker, with a limitation over in event of his decease without issue.

The executor requested defendant to issue the certificate representing John Baker's shares in the name of John Baker without showing the executory interest over. This defendant did. Defendant did not have a copy of the will but did know it was dealing with an executor.

John Baker sold the shares to a bona fide purchaser for value and endorsed over the certificate to the purchaser. The purchaser presented the certificate for transfer and defendant cancelled the old certificate and issued a new one to the purchaser.

John Baker died without issue.

The future interest holders filed suit against the corporation to recover for wrongful transfer.

The court cites *Lowry v. Bank, supra,* and many other cases, and holds defendant was bound to inquire as to the will and its terms, because of notice that it was dealing with an executor, and allowed recovery, adopting the following from *Bayard v. Bank,* 52 Pa. 235:

> "They [the defendant corporation] are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation."

Respondent here was under a duty to preserve petitioners' certificate of stock, not to cancel it, to preserve, not to destroy, their property. It failed to do so, and is therefore liable.

In *Lowry v. Bank, supra,* Chief Justice Taney in the 8th syllabus says:

> "If these officers at the time of the transfer had reason to believe that the executor by the act of transfer was converting this stock to his own use in violation of his duty, then the bank by permitting the transfer enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction."

Lowry v. Bank is also ample authority for the rule that the life tenant is not a necessary party in the action against the corporation. They are severally liable.

VIII. WHAT IS THE REMEDY? EQUITY WILL AFFORD COMPLETE RELIEF, INCLUDING DAMAGES.

These propositions have been so far established: demand was necessary; petitioners are not barred by laches or any statute of limitations; their vested remainder accelerated when the life tenant sold the property; and respondent is liable to them as absolute owners.

1. Now, *what is the remedy in equity?*

The remedy has already been mentioned as a by-product of the discussion.

7 *R. C. L.*, Sec. 251, p. 271:

> "If the corporation permits shares to be transferred without the owner's authority, it may be compelled to replace them or to pay damages."

6 *Thompson on Corporations* (3rd Ed.) Sec. 4428:

> "Equity will not only compel a corporation to make the transfer on its books in proper cases, but where stock has been transferred improperly or wrongfully by the corporation the original holder of such stock may by suit in equity compel the corporation to set aside such transfer and restore him to his rights as a stockholder."

Fletcher's Cyclopedia of Corporations (Perm. Ed.) Sec. 5551, pp. 500-502:

> "If a corporation recognizes a forged or unauthorised assignment of a certificate of stock * * * and registers the transfer on its books * * * it is guilty of a conversion of its shares, and the registered owner may maintain an action against it for damages, unless he is estopped to assert his title. * * *
>
> "Instead of suing at law for conversion, the owner of stock * * * may maintain a suit in equity to compel the corporation to replace the shares on its books in his name, and to issue to him a proper certificate, or, in the alternative, to recover a judgment for their value."

In support Fletcher cites cases from more than twenty important jurisdictions including New York and Ohio.

In *Cleveland and Mahoning Railroad Co. v. Robbins, supra,* the court says in Syl. 1:

> "* * * this breach of duty created a liability on the company to replace the stock to which F. was entitled, or to account for its value."

The Supreme Court of Ohio has uniformly so held.

Railway Co. v. Fink (1884) 41 O. S. 321;

Allen v. Insurance Co. (1894) 10 Oh. D. Repr. 204 (Aff. no Op., 52 O. S. 622), discussed *supra.*

Cook on Corporations (8th Ed.) Sec. 327, p. 1159:

> "The corporation may be compelled by the court to purchase an equal amount of stock and register it for the benefit of the *cestui que* trust."

One of the latest cases on the point is *West v. Tintic Standard Mining Co.* (1928) 71 Utah 158, 263 Pac. 490, 56 *A. L. R.* 1190, the court saying in Syl. 5:

> "One whose stock is wrongfully transferred on the books of the corporation may elect to compel the corporation to restore the stock or claim damages for its conversion."

2. But, of course, the restoration of the shares does not make the petitioners whole. They are also entitled to all dividends paid since the sale of the stock, and to the difference in value between that time and time of trial. As above shown, after October 31, 1929, it was their stock by acceleration.

In *Pollock v. National Bank* (1852) 7 N. Y. 274, 57 Am. Dec. 520, new certificates were issued on a forged power of attorney. The true owners filed suit in equity for recovery of the shares; the court holds:

> "* * * the bank is bound to issue new certificates *and account for the dividends.* * * *" (Italics ours.)

This case emphasizes the seriousness of cancelling the certificates, and has been followed many times both in New York and other states. See *Cushman v. Thayer Mfg. Co.* (1879) 76 N. Y. 369; *Salisbury Mills v. Townsend* (1871) 109 Mass. 121; *Pratt v. Taunton Copper Mfg. Co.* (1877) 123 Mass. 110, at 112, 25 Am. Rep. 37.

The federal courts have uniformly held the true shareholder is entitled to all dividends paid on the stock from the time of cancellation of the certificate.

Western Union Telegraph Co. v. Davenport (1878) 97 U. S. 369, 24 L. Ed. 1047;

Wilson v. Colorado Mining Co. (1915) 227 Fed. 721.

As will be recalled, *Allen v. Insurance Co.* (1894) 10 D. Repr. 204 (Aff. 52 O. S. 622), cited several times above, holds the dividends are recovered which were "declared since the wrongful transfer."

3. But, further, as above stated, the recovery of the stock, with mesne dividends, does not make petitioners whole. They are also entitled to damages. The New York rule applies as to the measure of damages, because this respondent's wrongs were committed in that state. 15 *C. J. S.*, p. 956.

Where the stock depreciates in value, the measure of damages is the value at the time of loss, with interest on such value. *McIntyre v. Whitney* (1910), 139 App. Div. 557, 124 N. Y. Supp. 234 (Aff. 201 N. Y. 526):

On the other hand, if the stock appreciates, the general rule applicable is thus stated in *Fletcher's Cyclopedia of Corporations* (Perm. Ed.), Sec. 5117, pp. 164, 165:

> "The so-called 'New York rule' is accepted as the rule generally applicable, in the absence of special circumstances, in many states, and seems to be growing in favor. Under it the proper measure of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time

after the owner has received notice of the conversion to enable him to replace the stock."

In support Fletcher cites, *inter alia,* many New York cases.

After some conflicting cases, the above general rule was formulated in *Baker v. Drake* (1873) 53 N. Y. 211, 13 Am. Rep. 507, and affirmed and finally established in the leading case of *Wright v. Bank* (1888) 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356, where Peckham, *J.,* wrote the opinion, and says on p. 249:

> "It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock. * * *"

This Court has approved this rule. *Galigher v. Jones* (1888) 129 U. S. 193, 32 L. Ed. 658.

The rule is generally followed in Federal Courts. *Rivinus v. Langford* (1896) 21 C. C. A. 581, 75 Fed. 959; *Satterwhite v. Harriman National B. & T. Co.* (1935) 13 F. Supp. 493; *Wilson v. Colorado Mining Co.* (1915) 227 Fed. 721; *In re Swift* (1902) 114 Fed. 947; *McKinley v. Williams* (1896) 74 Fed. 94; *Clements v. Mueller* (1930) 41 Fed. (2d) 41.

In other words, the measure of petitioners' damage, is either the value at the time of loss, or the highest value within a reasonable time after notice of the loss, whichever affords the greater recovery.

Satterwhite v. Harriman Bank, supra, decided in 1935, Syl. 1, states this alternative rule thus:

> "Measure of damages for conversion of corporation stock is market price at time of *actual conversion* or highest price within a reasonable time after owner has received notice of conversion, whichever of the two prices is higher." (Italics ours.)

Where the conversion is malicious or wilful, it may be stated, parenthetically, the measure of damages is the highest value up to the time of trial. *Kavanaugh v. McIntyre* (1911) 133 N. Y. Supp. 679, 74 Misc. 222.

It cannot be claimed in the instant case that the measure of damages is the value at time of demand in 1938, when the value was much less than it was before. (R. 48.)

Satterwhite v. Harriman Bank, supra, uses the phrase "at time of actual conversion."

The time of demand and refusal is immaterial, where an independent act of conversion was committed. *Sedgwick on Damages* (9th Ed.) Sec. 492.

In *Railroad Co. v. Robbins* (1880) 35 O. S. 483, the court held the cause of action did not accrue and the statute of limitations did not begin to run, until demand was refused, or plaintiff had notice; but the measure of damages was not fixed as of that time.

The right to sue is to be distinguished from the measure of damages. They are separate and independent. *Beale's Conflict of Laws,* pp. 85, 86.

4. However, to avoid controversy as to what value is to be taken, and what was a reasonable time after the conversion, petitioners have not urged recovery on that basis, but ask damages on the basis of the value at the time of the cancellation of the certificate on November 4, 1929, with interest. The stock having been restored by the district court, the amount of damages is the difference between the value of the stock at the time of cancellation and its value at the time of suit. The former was 239.4 and the latter 146⅓, a difference of $8,556.00 in money.

Having brought their suit in equity, petitioners' recovery should therefore be: (a) Restoration to them, not in trust, of the ninety-two shares; (b) Judgment for all dividends thereon since November 4, 1929, to the time of trial, aggregating $7,452.00, with interest on the respective dividends from time of payment; and (c) Judgment for $8,-

556.00, representing the difference between the value of the stock on November 4, 1929, and its value at the time of trial, with interest from that time.

5. It cannot be claimed that the Uniform Stock Transfer Act in some way changes the corporation's liability; this act is declaratory of the common law and merely codifies the common law.

West v. Tintic Standard Mining Co. (1928) 71 Utah 158, 263 Pac. 490, 56 A. L. R. 1190, is one of the latest cases holding the liability of corporations for wrongful transfers, is not changed by this Act.

Ohio is in accord. *Booth v. Cinn. Finance Co.* (1923) 19 App. 130 (Aff. 111 O. S. 361); *Laundry Co. v. Whitmore* (1915) 92 O. S. 44, at p. 54; *Railway Co. v. Bank* (1897) 56 O. S. 351.

Nor is it a tenable contention that a chancellor is without power to award damages as well as restore the lost stock in kind, with mesne dividends and interest.

In *Steindler v. Virginia Public Service Co.* (1934) 163 Va. 462, 175 S. E. 888, 95 A. L. R. 220, a late case, it is said in Syl. 3:

> "Where equity has once acquired jurisdiction of a cause, it may go on to complete adjudication, even to the extent of establishing legal rights and granting legal remedies."

On same point see, also, *Travis v. Knox Terpezone Co.* (1915) 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 387; *Thompson on Corporations,* (3rd Ed.) p. 291; 14 *C. J.* 1169.

Equity affords complete relief. It delights in doing complete justice. And nothing short of the relief here outlined will make petitioners whole and afford them complete justice.

Nor is this a proper case for application of the rule that equity abhors a forfeiture. The life tenant annihi-

lated the life estate by her own act of unauthorized sale before the suit was filed. In such cases the rule has no application. Equity does not decree forfeiture.

Big Six Development Co. v. Mitchell (1905), 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332 (Certiorari Denied).

C. CONCLUSION.

The will of Charles P. West, deceased, bequeathed to his widow a life use, and to petitioners a vested remainder;

The sale of the stock by the life tenant terminated her life estate as if she had died, and of necessity, the life use being extinguished, the remainder accelerated to plaintiffs' immediate use and enjoyment as their absolute property;

Respondent's cancellation of the certificate of stock, after sale by the life tenant, with full knowledge of petitioners' rights, further charged respondent with full knowledge of the life tenant's conversion and of the consequent acceleration of the remainder;

It was thereupon the duty of respondent, not to cancel petitioners' certificate, but to issue a certificate to them, in their name, and to pay them dividends from that time;

Having failed and refused to do so, respondent is now required to place petitioners in the position they would have occupied, had respondent performed its legal duty. This necessarily means that it must restore the stock, pay the dividends thereon from the time of acceleration, with interest on such dividends, and pay them the difference in the value of the stock between the time the certificate was cancelled and they were entitled to the stock, and the time of the trial, with interest on the difference. No other recovery will fully indemnify petitioners under the law;

And equity is fully competent to afford the relief they are entitled to.

Nor is the suit barred by the statute of limitations, or by laches.

To place petitioners in the precise position they would now be occupying if wrongs had not been committed by the life tenant, and by the respondent, as the district court did, means to encourage wrongdoing, and reward the guilty. Such consequences the law should not stoop to countenance.

Respectfully submitted,

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